Queen of the Valley Hospital, Napa Valley Medical Center, a Sisters of St. Joseph of Orange Corporation *and* California Nurses Association *and* Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL–CIO

Queen of the Valley Hospital, Napa Valley Medical Center, a Sisters of St. Joseph of Orange Corporation *and* California Nurses Association, Petitioner. Cases 20–CA–23684, 20–CA–23685, and 20–RC–16612

March 14, 1995

DECISION, ORDER, AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

On May 28, 1993, Administrative Law Judge James S. Jenson issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions[2] and to adopt the recommended Order.

We agree with the judge's dismissal of the allegation that the Respondent unlawfully threatened to withhold wage increases for employees covered by the representation petition filed by the California Nurses Association. Regardless of whether the May 17, 1990 letter announcing the intention to withhold the increases was lawful, we find that the Union waived its right to protest the threat to withhold the increases when it agreed not to file any unfair labor practice charge or objection to the results of a future election concerning the increases.[3] The Union asked the Respondent to go forward with the increases. The Respondent agreed to do so if the Union agreed not to file unfair labor practices or objections alleging that the increases were unlawful. By letter dated June 4, 1990, the Union informed the Regional Director for Region 20 that it waived the right to file unfair labor practice charges and election objections in connection with the Respondent's implementation of a pay raise. The letter began by stating:

> The purpose of this letter is to inform you that the California Nurses Association will not file and is expressly waiving any future right to file with the NLRB l.) any unfair labor practice charge in connection with the Hospital's general implementation of an ''up to 5% raise on July 1, 1990; and 2.) any objection to the results of any future election in connection with the general implementation of an ''up to'' 5% pay raise on July 1, 1990.

The last paragraph of the letter contained the following statements:

> The Hospital claims it would have given an ''up to'' 5% raise except for the legal restrictions placed on it by the filing of the CNA petition for an election. It has implied that it would be an unfair labor practice to do so. CNA's position is the reverse: this raise is part of the regular annual budget process and to fail to implement it, simply because a petition has been filed, would be an unfair labor practice. However, our goal is not to play word games and so we are formally notifying the NLRB of our intent to waive our right to file

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. In affirming the judge's findings, however, we do not rely on his use of the adverse inference rule. That rule applies only when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party. *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Here, however, the witnesses the General Counsel failed to call were employees who were present when alleged unlawful conduct occurred. These employees may not reasonably be assumed to be favorably disposed to any party in this proceeding. Accordingly, an adverse inference may not properly be drawn from the General Counsel's failure to call them. However, the judge may properly consider the failure to call an identified potentially corroborating witness as a factor in determining whether the General Counsel has established by a preponderance of the evidence that a violation has occurred. Cf. *Blue Flash Express*, 109 NLRB 591, 592 (1954). The judge explicitly used this approach in determining whether other violations were established. We find this analysis implicitly underlies the judge's determination of credibility in the case where he made reference to the adverse inference rule and it is on this ground alone that we affirm his credibility resolutions.

[2] No exceptions were filed to the judge's dismissal of the allegations contained in pars. 15, 17, and 23 and we adopt those judge's findings pro forma.

[3] Chairman Gould has no quarrel with the major portion of Member Truesdale's dissent which is addressed to the lawfulness of the Respondent's May 17, 1990 announcement. If he found it necessary to reach the allegation that the announcement was unlawful, he would decide the issue as Member Truesdale has done. Chairman Gould's only disagreement with his colleague is over whether it is necessary to reach the issue. For the reasons stated below, he does not think it is necessary because he finds that the parties essentially settled this issue when the Union informed the Regional Director for Region 20 that it waived its right to contest the lawfulness of the Respondent's conduct concerning the July increases and the Respondent then announced to the unit employees that the increases would be given in July.

Member Stephens does not reach the issue whether the May 17 announcement was an unfair labor practice, but agrees, for the reasons set out below, that the Union had clearly agreed to forgo filing charges over the matter.

an unfair labor practice, as described in paragraph one.

After receipt of the Union's June 4, 1990 letter agreeing to waive the filing of unfair labor practices or objections in connection with the increases, the Respondent announced June 6, 1990, that the increases would go into effect and would be reflected in the employees' July 5, 1990 paychecks.

Essentially, the parties' action constituted a settlement of the issue. In this regard, we disagree with our dissenting colleague's view that the Union's June 4, 1990 letter was not a ''clear and unmistakable'' waiver of the right to file unfair labor practice charges regarding the Respondent's May 17 announcement that it would not grant July increases. It was the May 17 announcement that prompted the Union to ask the Respondent to go forward with the increases. When the Respondent asked that it be assured that the Union would not file charges if increases were granted, the Union informed the Regional Director for Region 20 that it was ''expressly waiving'' the right to file charges in connection with the Hospital's ''general implementation'' of increases in July. The Union also informed the Regional Director that it disagreed with the Respondent's claim that it would have given the increases but for the legal restrictions placed on it by the Union's filing of the representation petition. The Respondent's claim was set forth in its May 17 announcement. Thus, the Union specifically referred to the legal issue raised by the Respondent's May 17 announcement and informed the Regional Director that despite its opposition to the Respondent's position on the issue the Union was waiving its right to file charges. Contrary to our dissenting colleague, we find this evinces a clear and unmistakable waiver of the right to file charges concerning the May 17 announcement. Indeed, to hold otherwise would permit the Union, contrary to what it said its goal was, ''to play word games.'' For these reasons, we agree with the judge's dismissal of the complaint allegation concerning the threat to withhold increases.

On October 18, 1990, an election was held in Case 20–RC–16612 pursuant to the Regional Director's decision directing an election. The tally of ballots shows 143 for and 162 against the Petitioner with 11 challenged ballots, an insufficient number to affect the results. No exceptions were filed to the judge's recommendation that the Petitioner's outstanding objections be overruled and that an appropriate certification be issued. Accordingly, the Board adopts, pro forma, in the absence of exceptions, the judge's recommendation and issues the appropriate certification below.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for California Nurses Association and that it is not the exclusive representative of the bargaining unit employees in Case 20–RC–16612.

MEMBER TRUESDALE, dissenting in part.

Contrary to my colleagues, I would find that the Respondent's May 17, 1990 announcement that unit employees would not be eligible for the wage increase scheduled for July 1, 1990, for all other employees, because of the pending election petition, violated Section 8(a)(1). In my view, the Respondent's announcement was clearly unlawful, as it placed the onus for the wage increase denial on the Union. Further, I respectfully disagree with my colleagues' finding that the Union waived its right to file unfair labor practice charges regarding this matter.[1]

The following facts are not disputed. On April 5, 1990, the California Nurses Association (CNA) filed a petition seeking to represent the Respondent's registered nurses and health professionals. On May 17, 1990, the Respondent announced in a memorandum to all employees that, pursuant to its budget for the fiscal year ending June 30, 1991, ''all employees except those who may be included in the CNA petition will be eligible to receive up to a 5% increase effective July 1, 1990.''[2] The memorandum also stated that ''[w]e have been advised that because of the petition filed with the NLRB by the nurses' union, CNA, we will not be able to put the July 1 wage increase into effect for any employee who may be covered by the petition.''

By letter dated May 22, 1990, CNA advised the Respondent that the Union did not object to an ''up to 5%'' increase and that ''[w]e have no intention, if this is your concern, of filing an Unfair Labor Practice Charge with the National Labor Relations Board should an 'up to' 5% increase be implemented.'' The

[1] In the absence of exceptions, I would adopt pro forma the judge's determination that the Union's election objections should be overruled. Accordingly, I agree with my colleagues that a certification of results should issue. I agree with my colleagues that the Respondent did not independently violate Sec. 8(a)(1) by requesting a waiver of CNA's right to file charges with the Board as a condition of granting the wage increase to unit employees. In addition to the reasons given by the judge in recommending that this allegation be dismissed, I would also rely on the fact that CNA volunteered to refrain from filing a charge prior to any mention of this issue by the Respondent, and the absence of evidence that employees were aware of the parties' communications in this regard.

[2] This increase had been determined during the course of the Respondent's annual budget process, which began the preceding fall. At that time, the Respondent determined that it needed to do ''something more'' regarding wages, especially for nurses, than it had in the 2 years immediately preceding fiscal year 1991. The Respondent first became aware of the CNA's organizing efforts in late January or early February 1990.

Respondent replied, in a letter dated May 24, 1990, that it

> would have granted a July 1, 1990 increase to its nurses except for the legal restrictions placed on the Hospital by the filing of your petition. If your organization is truly willing to remove itself as an obstacle to the granting of that increase, you will need to provide the National Labor Relations Board with a written statement that your organization will not file and is expressly waiving any future right to file with the NLRB (1) any unfair labor practice charge *and* (2) any objection to the results of any future election in connection with the granting of this wage increase.

On June 4, 1990, the CNA wrote to the Regional Director for Region 20 that it waived its rights to file charges or objections in connection with the Hospital's general implementation of an '''up to' 5% raise on July 1, 1990.'' On June 6, 1990, the Respondent advised the nurses that they would receive the scheduled increase after all. This notice stated that ''it is our normal practice following our annual budget review and approval process to announce to our staff the specifics of the new information regarding wage increases and/or adjustments. Today, we received guidance from our legal counsel that we can proceed with our normal practice.''

The Board has consistently found that an employer must proceed with an expected wage increase or benefit adjustment as if the union were not on the scene. *Atlantic Forest Products*, 282 NLRB 855, 858 (1987). An exception to this rule is that an employer may postpone wage or benefit adjustments during an organizational campaign; however, this exception is available only if the employer makes clear to employees that the adjustment would occur whether or not they select a union, and that the sole purpose of the postponement is to avoid the appearance of influencing the election's outcome. Id.; see also *Uarco, Inc*., 169 NLRB 1153, 1154 (1968). In making such announcements, moreover, the employer must avoid attributing to the union the onus for the postponement in wage or benefit adjustments, or disparaging and undermining the union by creating the impression that it stands in the way of the employees receiving the scheduled wage or benefit increase. Id.

Applying these principles, I would find that the Respondent unlawfully attributed to the Union the withholding of the scheduled July 1, 1990 wage increase. In this regard, it is undisputed that, prior to the advent of the Union, the Respondent had planned to grant all employees—including those in the petitioned-for unit—a wage increase for fiscal year 1991. Indeed, the Respondent's management team had, by its own admission, concluded that a substantial wage increase for nurses was particularly important to its ability to attract and retain qualified personnel. Its subsequent announcement that everyone but the petitioned-for employees would get a wage increase contains none of the safeguards which the Board has consistently required. Thus, the May 17 memorandum did not state that the wage increase was merely being postponed regarding the nurses and health professionals, or that the sole purpose of such postponement was to avoid the appearance of influencing the outcome of the upcoming election; rather, the memorandum's flat statement that the increase would not be put into effect for these individuals would reasonably tend to create the impression that no increase would be forthcoming as a result of the CNA's petition. See *Atlantic Forest Products*, supra at 858 (statement that in view of election objections ''we cannot say what increase there will be'' unlawful). Moreover, by linking these employees' exclusion from the general wage increase to the CNA's filing of the petition, the Respondent placed on the CNA the onus for withholding the increase. See *LRM Packaging*, 308 NLRB 829 (1992).

Contrary to my colleagues, I would not find that the Union waived its right to file charges regarding the May 17 memorandum. In my view, a waiver of statutory rights of this nature must be ''clear and unmistakable.'' Cf. *Northern Pacific Sealcoating*, 309 NLRB 759 (1992) (clear and unmistakable waiver of employer's right to file election petition). In this regard, I note that the letter to Region 20 which the Respondent extracted from the CNA by the above unlawful announcement and asserted by the Respondent to constitute a waiver of the Union's statutory right to file charges concerning its conduct, states only that the CNA waives any right to file charges regarding the ''general implementation of an 'up to' 5% raise on July 1, 1990.'' There is no mention in the CNA's letter of the Respondent's prior announcement that that raise would only be granted to employees whom CNA was not seeking to represent, let alone a ''clear and unmistakable'' waiver of the right to file charges regarding that announcement.

Boren Chertkov, Esq., for the General Counsel.
J. Mark Montobbio and *Philip L. Ross (Proskauer, Rose, Goetz & Mendelsohn)*, of San Francisco, California, for the Respondent.
Janet Sass-McDermott, of Sacramento, California, for California Nurses Association.

DECISION

STATEMENT OF THE CASE

JAMES S. JENSON, Administrative Law Judge. I heard this matter in Napa, California, on December 3–6 and 9, 1991. The charge in Case 20–CA–23684 was filed on October 25, 1990, by California Nurses Association (CNA) and the charge in Case 20–CA–23685 was filed on October 26, 1990, by Hospital and Health Care Workers Union Local

250, Service Employees International Union, AFL–CIO (Local 250). On March 29, 1991, the Acting Regional Director for Region 20 issued an order consolidating the two cases and a consolidated complaint. On October 24, 1991, the Regional Director for Region 20 issued a supplemental decision on objections to the election in Case 20–RC–16612 and ordered the three matters consolidated for hearing. The consolidated complaint, which was amended both prior to and at the hearing, alleges numerous 8(a)(1) violations. The objections to the election in Case 20–RC–16612 relate to certain allegations in the consolidated complaint. The Respondent denies it engaged in any unfair labor practices or objectionable election conduct.

All parties were given full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent filed briefs, both of which have been carefully considered.

On the entire record in the matters, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Queen of the Valley Hospital, Napa Valley Medical Center, a Sisters of St. Joseph of Orange Corporation, is engaged in the operation of a hospital providing inpatient and outpatient medical and professional care services for the public in Napa, California. Its gross revenues exceed $250,000 per year and it annually purchases and receives goods in excess of $5000 which originate from points outside the State of California. It was admitted and is found that at all times material, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

California Nurses Association and Hospital and Health Care Workers Union Local 250, Service Employees International Union, AFL–CIO, each is a labor organization within the meaning of Section 2(5) of the Act.

III. CREDIBILITY

As in most 8(a)(1) violations and hearings on objections to elections, credibility is a critical issue, the record revealing considerable conflict between the witnesses who testified on behalf of the General Counsel and those testifying on behalf of Respondent. In addition to the demeanor of the witnesses while they were testifying, I have considered other factors such as their ability to recall past conversations or events, the consistency or inconsistency of their testimony when it is considered in the context of other testimony, documentary evidence, and matters not in dispute, which version appears to be more logical in the circumstances, the various positions occupied by the witnesses and their possible bias and/or interest in the outcome, and whether witnesses were called to either corroborate or refute another witness' testimony in those instances where the record shows there were more persons present than the two presenting conflicting testimony. Having the burden of proving a violation of the Act, the General Counsel was incumbent to either call them to corroborate his witnesses, to refute Respondent's witnesses, or to explain why they were not called as witnesses.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *An Overview*

The Respondent operates a hospital providing inpatient and outpatient care in Napa, California. The record shows that in October or November 1989, CNA commenced organizing activities among Respondent's nurses and other professional employees. Having learned of the organizing activities in late January or early February 1990, on February 15, Respondent's president, Sister Ann McGuinn, directed a letter to all registered nurses expressing opposition to the CNA. The General Counsel does not allege the letter contained any unlawful statements. On April 5, 1990, CNA filed its initial representation petition in Case 20–RC–16612 seeking certification as the representative of all registered nurses and health professionals. On April 30, 1990, Local 250 advised Respondent's president that it also was engaging in organizing efforts, and on August 8, filed a representation petition. Following a hearing on the CNA petition, on September 19, the Regional Director issued a decision directing an election in an appropriate collective-bargaining unit. The election was held on October 18, which CNA lost by a vote of 143 to 162 with 11 challenged ballots. Thereafter, CNA filed the charge in Case 20–CA–23684 and timely objections to the election which were later consolidated for hearing. On October 4, 1990, the Regional Director issued a decision directing an election in the unit sought by Local 250. On October 26, 1990, Local 250 filed the charge in Case 20–CA–23685, which had the effect of blocking the election scheduled for November 1. On March 29, 1991,[1] the consolidated complaint issued and was amended on April 26. On May 29, Local 250 filed a request to proceed with the election in the unit covered by its petition. The election was held on June 26, which the Union lost by a vote of 175 to 341. No objections to the election were filed and a certification of election results issued.

At the conclusion of his case-in-chief, the General Counsel withdrew the allegations in the following paragraphs of the complaint: 9(a) and (b); 10; 13; 14(a) and (b); 18(a), (b), and (c); and 22 insofar as it involved conduct alleged to have occurred by Hyatt Holt, Sister Ann McGuinn, and Beth Lincoln. At that time CNA also withdrew objections to the election numbers 3, 7, and 8.

B. *The Alleged 8(a)(1) Statements and Conduct*

All of the acts and conduct alleged in the complaint to be unlawful span the period from May 17, 1990, through January 1, 1991, which was after the Respondent had knowledge of the organizing activities of both CNA and Local 250. Sister Ann McGuinn (Sister Ann) is Respondent's president and CEO; Hyatt Holt is the vice president of human resources; David Ellis is a night-shift supervisor; Patrick Odell is an outpatient laboratory supervisor; Robert Carey is the director of respiratory therapy; Beverly Dunbar is director of medical records; Laura Brenneman is vice president of patient care

[1] All dates hereinafter are in 1991 unless stated to the contrary.

services; Kathleen Adams is administrative director of operations for patient care; and Dana Stone and Marilyn Majors are both cardiac unit charge nurses. All the above are alleged and admitted to be Respondent's supervisors and agents.

Paragraph 7(c) of the complaint alleges that in August 1990, Sister Ann threatened employees that Respondent would eliminate certain programs offered to the general public and impliedly threatened employees with a job loss and/or a loss of work opportunities. Elizabeth Thompson, an organizer and open supporter of CNA from the beginning, testified she attended a meeting in August 1990 along with 10 or 15 other employees in which Sister Ann, reading from note cards, told those present that ''if the union was elected into the hospital, that they would have to do away . . . with Healthy Mom and Babies program, the dental program for the underprivileged, and I believe she named some other programs that I can't remember. But they would have to stop.'' She also claimed she asked why but that her question was not answered.[2] The General Counsel called no other witnesses regarding this allegation.

Sister Ann testified that she held a series of eight or nine meetings with employees in August 1990, for the purpose of discussing the hospital's mission and philosophy as it related to health care. She testified that she spoke from a series of index cards which she had prepared. Brenneman, who had been hired recently, was present at all the meetings since she was a recent hire, some of the employees had not met her yet and Sister Ann wanted to show her support for Brenneman. She testified she told each group that she was not there to talk about the Union, but to talk about the mission of the hospital, values, the care they wanted to render to their patients, the programs such as Healthy Moms and Babies and the community dental clinic which the hospital supported, and the fact that outside pressures related to funding made the mission difficult, but that it would be carried out ''no matter what would happen.'' She specifically denied Thompson's claim that she said programs such as Healthy Moms and Babies and the dental clinic would be closed if the Union were elected.[3] Brenneman corroborated Sister Ann's testimony and denied Thompson's claim that Sister Ann or anyone else said the hospital would close any of its programs if the Union came in. I credit the testimony of Sister Ann and Brenneman, and noting that the General Counsel failed to call any other witness to either corroborate Thompson's testimony or refute that of Sister Ann and Brenneman, find that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent engaged in the conduct alleged in paragraph 7(c) of the complaint and recommend its dismissal.

Paragraph 8(a) alleges that on two unknown dates in or about October 1990, Sister Ann and/or Adams, threatened employees it would eliminate certain programs offered to the general public and impliedly threatened a job loss and/or loss of work opportunities if the employees selected CNA and/or Local 250 as their bargaining representative. Paragraph 8(b) alleges that Sister Ann and/or Adams told employees in October that filing unfair labor practice charges was an attack on Respondent and its managers.

Michael Derby, a respiratory therapist that has since left Respondent's employ, was active on behalf of both CNA and Local 250. He testified that he attended a meeting in late October 1990 along with 8 to 10 other employees, 2 unknown supervisors, and Sister Ann. He testified that Sister Ann spoke from cards about the hospital's position on ''the union's decision to file some charges against the hospital'' at which point she looked up from the cards that she was reading and said that ''she felt attacked personally by what had happened. And that this in effect was also attacking the hospital. And that it was also attacking the people who worked in the hospital.'' He testified Sister Ann rose from her seat and reiterated the above feelings and then went to the back of the room.[4] He went on to testify that one of the two unidentified supervisors, one of whom he tentatively identified as Adams, presented a chart regarding union dues and how much the Union was spending on consultation fees. The other supervisor, he claimed, talked about the mission of the hospital and that it would not be able to carry it out if the Union was allowed to come into the hospital, mentioning ''Clinic Ole,[5] Healthy Moms and Babies and a dental program that was set up at the hospital at the time,'' also, the hospital would not have enough money for projects such as the linear accelerator and MRI; that similar future projects would not be possible ''because it would cost a lot of money to have the union in the hospital.'' He claimed that Sister Ann indicated agreement with what was said by nodding her head affirmatively. Sister Ann testified that she held a number of meetings with employees in late October and that she read from a prepared text, Respondent's Exhibit 35, attached hereto as Appendix A, from which she did not deviate. She denied she read from note cards as Derby claimed, that she went to the back of the room after making her presentation, or that any of the supervisors stated that if the Union came in the hospital would not be able to afford its mission works such as Clinic Ole, Healthy Moms and Babies, and the dental clinic, or not be able to go forward with the linear accelerator and MRI. Sister Ann's testimony was corroborated by Brenneman. While Derby identified other employees present at the meeting, none were called to either corroborate his testimony or refute that of Sister Ann or Brenneman. I credit the latter two, find that the General Counsel has failed to prove by a preponderance of the evidence the allegations contained in complaint paragraphs 8(a) and (b) and recommend their dismissal.

Paragraph 11(a) alleges that on an unknown date in July 1990, Odell threatened that Respondent would close the outpatient laboratory if Local 250 won the election.

Christine Adams, a phlebotomist in the outpatient lab and an active organizer for Local 250, testified that in July, Odell brought some prohospital literature into the phlebotomist room and mentioned that those in the room, Adams, Alona

[2] The Healthy Moms and Babies program and dental clinic are services provided to the community and supported by outside grants and Government funds and cosponsored by several organizations such as the county of Napa, Kaiser Clinic, and Respondent. A few of Respondent's employees work in the programs on a volunteer basis.

[3] The cards from which she spoke are in the record as R. Exh. 36.

[4] CNA's unfair labor practice charge was filed on October 25, 1990, and Local 250s the following day.

[5] Clinic Ole is a community clinic in Yountville, a nearby town, to which Respondent contributes some services but no financial contribution.

Valencia, and Cathy Gillen, should read it.[6] According to Adams, the three women talked to Odell about the fact they were not working ''strictly as phlebotomists'' and felt they were not being paid for the variety of other duties they were performing. His response, according to Adams, was ''that we were very flexible where we were at, as a phlebotomist. And if the union came in, we wouldn't be able to keep operating, because they couldn't afford the wages to hire strictly as a phlebotomist, doing drawing blood only. And the lab would eventually close because of that.'' She claimed that on another occasion, near the water fountain, she asked Odell if it was really true ''that the lab will close down because of union activity . . . if the union was voted in, would we lose our jobs because of this? He said yes, because the flexibility, as a phlebotomist, without the union here.'' Odell admitted having commented on the subject of flexibility in connection with a union contract. He testified ''the gist of the comments was that I had had experiences working in business that were under union contracts, and that in my experience . . . the jobs were very rigidly defined, they were very specific in terms of duties under the contract. And, that due to my experiences, I had some concerns that under a union contract the outpatient laboratory, in terms of jobs, might lose some flexibility.'' He denied specifically saying anything about closing the outpatient lab at that time or that he later responded to a question by her that the facility would close if the Union came in. Any doubt as to which of the two, Adams or Odell, was not telling the truth could have been dispelled had the General Counsel called either Alona Valencia or Cathy Gillen as a witness. An inference adverse to the party who fails to call witnesses otherwise available to it, or neglects to explain the failure to call such witnesses, has been established law since the early days of the Board. *Freuhauf Trailer Co.*, 1 NLRB 68 (1935), revd. 85 F.2d 391 (6th Cir. 1936), 301 U.S. 49 (1937), reversing circuit and enforcing the Board. Accordingly, it is found that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent engaged in the unlawful conduct alleged in paragraph 11(a) and its dismissal is recommended.

Paragraph 11(b) alleges that in September, Odell interrogated employees regarding their union activities and/or sympathies, and paragraph 22 alleges, in part, that in July, Odell prohibited union-related solicitations and distributions at Respondent's facility. In his brief the General Counsel argues that both allegations relate to a single incident, the removal of a union button from a bulletin board, which he places in September for the purposes of paragraph 11(b) and in July for the purposes of paragraph 22.[7] The General Counsel again relies on the testimony of Christina Adams to support these allegations. She testified that after a ''prounion'' button had been posted on the bulletin board for a couple of days, Odell came in and said, ''What is this doing here?[8] It cannot be here . . . it was soliciting'' after which ''he took it off the board and took it off the counter.''[9] She testified that Alona Valencia and Cathy Gillen were present and that ''it was kind of our personal board'' and had been used for posting restaurant menus, fundraisers, party notices, and other notes. On cross-examination, she acknowledged she had worn both a Local 250 button and a red ribbon signifying support for Local 250 up until the time of the election which was on June 26, 1991, that other employees wore red ribbons in support of Local 250, that employees wore ribbons and buttons in support of CNA, and yellow ribbons signifying the employee was not for a union. There was also testimony that some employees wore a red, white, and blue ribbon signifying ''freedom of choice.'' Odell admitted that he had removed a union button from the bulletin board and that he said something to the effect that it should not be there; that there are about four bulletin boards in the area; and that he had never seen anything posted on the bulletin boards that was not official hospital material except on one occasion when someone had brought from home a child's fingerpainting. He testified that a number of employees wore union buttons and ribbons and denied asking anyone to remove them. In determining who to believe, Adams or Odell, I again note that Adams claimed both Alona Valencia and Cathy Gillen were present, yet neither was called to corroborate her testimony or to refute Odell's that the bulletin boards were used only for official hospital postings. Further, it is clear that union buttons and ribbons were worn throughout the periods leading up to both elections without impunity. It is further clear that in these circumstances the removal of a Local 250 union button from a bulletin board on a single occasion approximately 1 year prior to the election neither had the effect of interfering with, restraining, or coercing employees in the rights guaranteed them in Section 7 of the Act. Accordingly, I find that the General Counsel failed to prove by a preponderance of the evidence the allegations contained in paragraphs 11(b) and 22 insofar as the latter alleges Odell engaged in any unlawful conduct and recommended their dismissal

Paragraph 22 also alleges that in October 1990, Stone and Majors permitted nonunion-related, but prohibited union-related, solicitations and distributions. Patricia Hansen, a unit secretary-cardiac monitor tech in a patient care area of the hospital, testified without contradiction that during the period from August through October 1990, prounion and and antiunion literature would appear on the counter surrounding her work area and that on a couple of occasions she observed Stone and Majors pick up the union literature and throw it away. She never saw them throw away antiunion literature, nor did she identify who placed it there, what happened to it, or whether Stone or Majors knew it was there. She also testified without contradiction that around Halloween, Majors left a plate of cookies on the counter, that an unidentified employee also left a plastic pumpkin filled with candy, and that an unidentified person left a brown paper bag containing candy which had a ''Union Yes'' sticker on the outside which was covered by a Halloween poem. The other items displayed no prounion or antiunion literature. After half an hour or more Stone and another individual picked up the

[6] Adams acknowledged on cross-examination that Local 250 had filed an unfair labor practice charge on her behalf against Respondent alleging she was being discriminated against. Following investigation by the Regional Office, the charge was dismissed. The dismissal was sustained on appeal.

[7] G.C. Br. at pp. 39 and 43.

[8] The basis for the ''interrogation'' alleged to have occurred in September 1990 in par. 11(b) per G.C. Br. at p. 43.

[9] The basis for the prohibition against union-related solicitations and distributions alleged to have occurred in July 1990 in par. 22 per G.C. Br. at pp. 39–40.

bag, observed the ''Union Yes'' sticker, dumped the candy onto a plate and threw away the bag with the sticker. She acknowledged that union buttons and ribbons were worn openly throughout both election periods without incident. Hansen also testified that catalogs for products such as Avon and Tupperware were left on the counter as well as candy for sale by school children.

The General Counsel does not contend the Respondent's no-solicitation and no-distribution rule is unlawful, but that it is disparately applied to allow nonunion-related material and to prohibit union-related material. The Respondent argues that it was not shown that either Stone or Majors were aware of any antiunion literature on the counter and therefore, the General Counsel failed to show disparate treatment in connection with the enforcement of the no-solicitation/distribution rule. Respondent further argues that it was not shown that any agent of the hospital had knowledge that Avon and Tupperware catalogs were left at the central desk. Further, the removal of the paper bag with the ''Union Yes'' sticker was permissible since it is not unlawful to prohibit distributions of literature in patient care areas of a hospital as was done here, citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978); *NLRB v. Baptist Hospital*, 442 U.S. 773 (1979).[10] Respondent also argues that even if permitting the food and candy to remain could somehow be considered an inconsistent application of the no-distribution rule, it was clearly an isolated incident with no coercive implications, and therefore insufficient to rise to a violation of the Act.

Having carefully reviewed Hansen's testimony, I am persuaded that the General Counsel failed to establish disparate treatment. Thus, while it was shown that Stone and Majors disposed of prounion literature, it was not shown who put antiunion literature out or that any agent of the hospital was aware that antiunion literature was placed on the counter, or that if Respondent's supervisors were aware of it, that it was not removed. Apparently the General Counsel would like me to assume a fact not shown in the record—that agents of Respondent permitted antiunion distributions and solicitations in a patient care area while prohibiting union distributions and solicitations. Failing to establish that by a preponderance of the evidence in either instance, I recommend dismissal of paragraph 22 in its entirety.

Paragraph 12 alleges that in October 1990, Dunbar interrogated employees about their union activities and sympathies. Paragraph 16(a) alleges that in September or October 1990, Dunbar disparaged employees because of their union activities and/or sympathies, and paragraph 16(b) alleges she told employees their union activities made her so angry that she felt like engaging in physical violence against them. Medical transcriptionist Mary Ellen Rhude testified that around October she attended a meeting on health benefits along with 20 to 25 other employees over which Dunbar presided. While she claimed Dunbar handed out a paper showing health benefit costs to become effective in January, the record shows Respondent did not find out from its actuaries until November that premium costs would be lower the next year. She testified that Dunbar

> asked one of the employees sitting there, and I don't recall her name because I was very new and I didn't know everyone at the time, if she had been to the union meeting she had asked her to go to and report back about.
>
> And she said, no.
>
> The employee said no, that she hadn't been able to go. But then Beverly Dunbar asked her if she would attend the next one, which I believe was that morning, and report back to her.
>
> Because she said she—Ms. Dunbar said she would love to go but couldn't.
>
> And that would she report back to her and tell her what went on and what happened.
>
> And the employee said she would.

Dunbar denied asking any employee to attend a union meeting and report back to her. She testified, ''We urged the employees, if they chose to do so, to attend those meetings and share among themselves the information they heard . . . our goal was to get the employees to understand as much of both sides of the stories as they could so they could make . . . informed votes.'' While Rhude had claimed 20 to 25 other employees were present at the meeting, and furnished specific names at the hearing, The General Counsel failed to call any to either corroborate Rhude's testimony or refute that of Dunbar. In these circumstances I credit the testimony of Dunbar, find that the General Counsel has failed to establish by a preponderance of the evidence the allegation in paragraph 12 of the complaint, and recommend its dismissal.

With respect to complaint paragraph 16, Rhude testified that at the same meeting Dunbar read

> two letters written by two employees of Queen of the Valley Hospital stating how they—why they felt as they felt about the issues that were going on. And Ms. Dunbar read one from Don Raina in which she stated that how dare he write a letter like that, because regarding his mental status, that he had come through rehab. That the nuns had given him a job there. And how dare he . . . she said it made her so angry that when he came in to deliver supplies and bent over to set them down, that she would just like to kick him in the rear end, she was so angry with him for writing that letter expressing his feelings. Oh, then she said about the other letter that whoever wrote it couldn't even write a proper letter. That it had typographical errors and things like that. And sort of disclaiming the fact that it was written by anybody who was competent to do that.

On cross-examination Rhude identified the writer of the second letter as Mike Derby and testified Dunbar said, ''That he had written this letter stating his feelings and why he was supportive of the union, but that look at the inconsistencies in his punctuation and spelling and the way it was written. That he wasn't even capable of writing a proper letter.''[11] She testified the statements regarding Raina and Derby were made before everybody. Dunbar testified that in a meeting in August she mentioned Raina since she had seen his name on

[10] It is clear from Hansen's testimony that these events occurred in a patient care area.

[11] The record also shows that Local 250 filed an unfair labor practice charge against Respondent involving a claim by Rhude, which was dismissed.

a list of steering committee members that were prounion, that it surprised her and that she commented to the employees that she was surprised to see his name on the list since he had come from a vocational rehabilitation program, that the hospital had been good to him and he had had a good job for a good number of years. She denied she mentioned Raina's mental status or that she knew anything about it. Her understanding of the vocational rehabilitation program that he had come from was one where an individual is subsidized until he or she acquires the skills to perform at the level expected on whatever job is involved. She denied she stated ''how dare'' he write a prounion letter, that she said she was angry at him for writing a letter or supporting the Union, or that she said she was so angry at him that she felt like kicking him in the rear end. She also testified that the first time she learned that a claim was being made that she had said something disparaging or inappropriate about Raina was after a charge had been filed and the Board's Regional Office informed her of the fact. She then initiated a call and met with Raina to apologize for whatever he may have heard. She stated she did not know what he had heard but it was bothering her that he might be upset about it. Her testimony regarding the conversation was:

> I said . . . that it had been brought to my attention that I had . . . made . . . some brief comments about him in a meeting.
>
> I—we never asked each other what was said.
>
> I said, Don, I didn't know if you'd heard that or not, and he said yes I did.
>
> And I said, um—I want you to know that whatever I said I'm sorry for. I, I have no intention, never have had an intention of hurting your feelings. I wouldn't want your feelings to be hurt. If it's bothering you that you might be mis, that you might feel badly about it.
>
> He and I had worked together for years. I think I mentioned that. . . . And he said . . . Bev, . . . I just considered you were probably under stress. That was his response to me.
>
> And I said, well, I apologize. I want you to know I apologize. And he said that was fine or something. I can't remember what his response was.

Regarding Rhude's claim that Dunbar had referred to Mike Derby's inability to write a proper letter since ''it had typographical errors and things like that, and sort of disclaiming the fact that it was written by anybody who was competent to do that,'' Dunbar testified Derby was a personal friend and denied she made fun of a letter he had written, said anything derogatory about him nor made any reference to him. I note again that Rhude testified there were 20 to 25 employees present when the alleged statements by Dunbar were made and that the General Counsel failed to call any of them to either corroborate Rhude's testimony or refute Dunbar's. Crediting Dunbar's denial that she mentioned or knew anything about Raina's mental state or said anything about it, her denial that she stated ''how dare'' he write a prounion letter, her denial she stated she was angry at him for writing a letter or supporting the Union, and her denial that she said she felt like kicking him in the rear end, and further crediting her denial that she said anything derogatory about Mike Derby, it is found that the General Counsel has failed to prove by a preponderance of the evidence the allegations contained in paragraphs 16(a) and (b) of the complaint and recommend their dismissal.

Paragraph 15 alleges that on an unknown date in or about August 1990 ''Jane Doe'' threatened to close departments if CNA and/or Local 250 won the election. Karen Dixon, who worked in respiratory therapy from August 20, 1990, to about September 13 of the same year, testified that after she was hired, but prior to starting work, she attended an orientation meeting along with about 30 other employees that was conducted by a blond lady who stated, ''[B]asically that, if the Union were to organize there in the hospital, we would have to pay outrageous dues. And, not only that, but possibly because the Union was there, they might have to close departments, because they would have to increase pay wages and so on and so forth. And that it would just be too much for the hospital to bear at that time.''[12] While she testified Sister Ann was present but did not say anything, in his brief the General Counsel attributes the above remarks to Sister Ann.

Mary Lee Newton, a hospital nurse educator, conducts meetings to orient new employees in policy, procedures, and safety information on the second Monday of every month, the August 1990 meeting falling on August 13, the day Dixon was hired and a week prior to starting work. The meetings start at 8 a.m. and run until 4:30 p.m. Newton testified that employees that have been hired and passed their physical are scheduled to attend and receive pay as employees for attending. Dixon did not receive her physical until August 15. Her name was not included on the general hospital orientation list for August 9, nor do hospital records reveal she signed the attendance list. Newton testified she knew of no instance where a person had been scheduled or attended orientation prior to taking a physical. She testified that she tells employees repeatedly to sign in, that she counts the people in the room and checks the sign-in sheet against the list that are scheduled for orientation and takes the sign-in sheet specifically to those that haven't signed in. She did not recall ever meeting Dixon. Respondent's records show Dixon was scheduled to attend the September 10 orientation meeting; however, her name is not listed on the printout of attendees. Newton denied specifically Dixon's testimony that she or anyone said that if the Union organized, the employees would have to pay outrageous dues or possibly close departments because the hospital would have to increase wages. She also refuted Dixon's claim that Sister Ann remained in the room following her short introductory remarks. The fact that Dixon's testimony is not corroborated by anyone that attended the August 13 orientation meeting and is specifically denied by Newton, convinces me her testimony is not true. It is therefore found that the General Counsel has failed to prove by a preponderance of the evidence the allegations contained in paragraph 15, and its dismissal is recommended.

Paragraph 17 alleges that in September 1990, Ellis singled out employees who supported Local 250 for work performance monitoring by their coworkers. Mary Ellen Moskowite is a registered nurse II in the intensive care unit and Ellis is the night-shift charge nurse in intensive care, a supervisory

[12] Dixon confirmed a statement taken by a Board agent that the orientation meeting took place about a week before she started work on August 20.

position. This allegation is based on a conversation between Moskowite, who was acting as the relief charge nurse while Ellis was acting as the p.m. supervisor. The Decision and Direction of Election had issued recently in Case 20–RC–16612 wherein it was determined that respiratory therapists were not to be included in the CNA unit on the ground they were not ''professionals.'' As noted earlier, Michael Derby was a respiratory therapist. He had been an active CNA supporter and later active for Local 250. Moskowite testified on direct examination that Ellis ''came up to me after a report and asked me if I'd noticed a work slowdown by Mike Derby'' to which she responded, ''Well, I don't understand what you're talking about.'' She testified further, ''And he had told me that since the decision from the NLRB came down that respiratory therapists were not going to be considered professionals, that Mike had been overheard saying that . . . 'Gee, I'm not a professional' . . . and he wanted me to report any . . . 'intentional work slowdown by Mike Derby' to himself or my other charge nurse . . . and to his immediate boss . . . which I believe was Mr. Carey, for disciplinary actions.'' She responded she had never had any problem regarding Derby's work performance. On cross-examination, she testified she had documented what had happened, given a copy to Derby, and attached a copy to the statement given a Board agent. The memo states in pertinent part:

> On Sunday, September 23rd, I was approached by Mr. Dave Ellis as I was working in the ICU as a relief charge nurse. I was asked if I noticed a work slowdown. I stated I did not understand the question. Dave stated since the NLRB decision on who was included in union negotiations, Mike Derby has been heard saying, ''I'm not a professional.'' Dave wanted to know if Mike had been intentionally slowing down his response to any of the nurses' request for respiratory service. I stated I have never had any problems or concerns regarding his care or response time to my requests. Dave asked me to report any intentional work slowdown by Mike Derby to him, Randy Passoni or other nursing supervisor, and that Mike's boss would like to know for disciplinary measures [Dave stated the head of respiratory therapy's name, which I forgot the name at that point].

Ellis testified that he had just come from a management meeting where they had been told to be aware of work slowdowns, ''and I told her that due to the decision handed down by the Labor Board as to who was considered a professional to be represented by CNA and who was to be non-professional, represented by 250, that there had been some work slowdowns already. And she asked me 'What is a work slowdown?' I have her the example that had been given to me of a respiratory therapist by the name of Michael Derby who was out on two-south, was approached by a registered nurse and asked to evaluate a patient who was not on his card of treatments. But she wanted his opinion before she called the physician. . . . And we were told that Michael turned away from the registered nurse, mumbling, 'I am not professional enough,' and walked away. . . . I told her that if she observed anybody refusing to do their job, whether it was a respiratory therapist, a nurse, a housekeeper—whoever—to report it immediately to the shift supervisor and that it would be taken care of.'' He denied he asked her to report on any union activities of Derby or any other employee.

The General Counsel argues that Ellis singled out Derby for surveillance by Moskowite because of his union activities and that the allegation by Respondent that Derby had in fact engaged in the misconduct Ellis alluded to, must be rejected as a pretext since no evidence was presented he in fact refused to evaluate a patient at an RN's request. By the same token, the General Counsel had possession of Moskowite's affidavit and her memo attached to it which clearly raised the issue of Derby's engagement in a work slowdown, yet he failed to bring up the subject or elicit a denial when Derby was on the witness stand. The Respondent argues that under either version of the conversation, no unfair labor practice occurred since Moskowite was asked to only report on a ''work slowdown'' which is unprotected conduct, citing *Philip Industries*, 295 NLRB 717, 732 (1989), wherein the administrative law judge stated, with apparent Board approval:

> [A] concerted plan to work at a pace slower than normal is not ''protected activity'' under the National Labor Relations Act. *Elk Lumber Co*., 91 NLRB 333 (1950). See also *Polytech, Inc*., 195 NLRB 695, 696 (1972). It follows that if concerted activity to engage in a slowdown is not protected, then certainly individual efforts to engage in a slowdown are not protected. Cf. *Meyers Industries*, 281 NLRB 882, 887 fn. 42 (1986).

It is clear that Derby, who had been active on behalf of CNA, was ''stunned'' by the Board's finding that respiratory therapists ''weren't professional, that we were technicians,'' which gives some credence, however, slight, to the claim he may have engaged in a ''slowdown'' or refused to perform a service expected of him. Of course, his protest against the Board's finding could not be construed as a protest against Section 7 rights for which the Respondent could be held responsible. In any event, I am not persuaded that Ellis' request that Moskowite report any intentional work slowdown by Derby had any relationship to his union activity, and particularly Local 250 as alleged in the complaint, since Derby had been a CNA supporter and was disgruntled over the fact he wasn't a ''professional'' and would therefore be included in the Local 250 unit. Further, the record fails to establish that Moskowite was asked to monitor Derby's ''work performance'' as alleged. Rather, it shows she was to report on a ''work slowdown'' which is not a protected activity. The General Counsel having failed to establish by a preponderance of the evidence the allegation in paragraph 17, I recommend its dismissal.

Paragraph 23 alleges that in August 1990, Carey selectively enforced Respondent's dress code concerning the wearing of pins and insignia, by prohibiting employees from wearing Local 250 pins. Karen Dixon, whose testimony I declined to credit with respect to paragraph 15 of the complaint, testified that on August 20, her first day at work as a respiratory therapist, she observed another employee wearing a Local 250 button and asked where he had gotten it and he gave it to her. She testified she pinned it on her jacket along with four or five other pins and badges, including an official hospital badge. She went on to testify that when Carey saw it, he told her that he did not think it was appropriate and to remove it. She did not and continued to wear

it throughout her employment. Other employees in the area wore union pins also throughout her employment. She admitted on cross-examination that she had belonged to Local 250 while working at Kaiser Hospital in Martinez, California. Her application for employment with Respondent discloses she failed to reveal her prior employment at Kaiser. Carey testified he had observed Dixon and other employees wearing union buttons and ribbons but that he never asked Dixon or any other employee to remove them. Carey was the more credible of the two. Accordingly, it is found that the General Counsel failed to establish by a preponderance of the evidence that Carey prohibited employees from wearing Local 250 pins and the dismissal of paragraph 23 is recommended.

C. *Economic Issues*

1. Budget

Respondent's annual budget is based on a fiscal year running from July 1 to June 30 of the following year, the fiscal year designation being based on the last day of the fiscal year, that is, fiscal year 1991 runs from July 1, 1990, to June 30, 1991. The budget planning process begins in the fall of the year preceding the start of the fiscal year, that is, the budget planning process for fiscal year 1991 commenced in the fall of 1989 with an administrative council retreat, and by custom continues in accordance with a prearranged written schedule through May when the budget is submitted to the St. Joseph Health System for final approval. The administrative counsel is composed of Sister Ann, president of the hospital, the vice president for finance and support services, Matthew Larson, the vice president of human resources, Hyatt Holt, other vice presidents, the comptroller, and the medical director. Holt testified that prior to the retreat he contacts other hospitals, both union and nonunion, and other employers to gather information on the wages and benefits they are paying or expect to pay, so that Respondent will be competitive and able to recruit and retain professional, clerical, and support personnel. He testified he makes generalized recommendations at the retreat regarding wages and specific recommendations with respect to what fringe benefits should be offered and how their costs should be allocated. Any agreements that are made are subject to what the budget will finally allow. Holt and his staff continue to contact hospitals in the area so they can keep up to date on their wage structures and in January participate in a formal wage survey of hospitals by Hospital Human Resource Management Association of California (HHRMAC), the results of which are issued in March and contain a summary by occupation of what wages are being paid in the marketplace. He testified that in January he makes specific recommendations regarding salary for those classifications of employees where there are traditional shortages such as nurses. Also in January, the department heads receive budget packages with which they project their estimates of the levels of activity, salary, nonsalary, and capital expenditures their departments will require for the next fiscal year. They are slated for completion in February. This is followed in March by an administrative review of each department's budget package by the president of the hospital and the chief financial officer with each department head and the department head's administrative vice president. Following completion of the administrative reviews, final decisions are made with respect to the budget. Upon finalizing, the budget proposal is typed, edited, and assembled into a detailed budget book and in mid-April sent to the budget committee of the Hospital's board of trustees for review. It is then transmitted to the parent corporation, St. Joseph Health System, for final review and approval, a process that takes several weeks. If not delayed by modifications by the Health System, the budget is approved by mid-May. Due to modifications made by the Health System in 1988 and 1989 for fiscal years 1989 and 1990, respectively, because of severe financial conditions, final budget approval in those years came in early June. Approval by the Health System is followed by a letter from the president of the hospital, Sister Ann, to all employees containing general, but nonspecific, information on wages and benefits. Such a letter, General Counsel's Exhibit 4 (Appendix B attached hereto), was sent to all employees on May 17, 1990, for fiscal year 1991, and is the subject of complaint paragraph 7(a).

2. Salary administration policy

Prior to 1987, Respondent's salary administration policy was comprised of three components. (1) *General wage increases* which applied to everyone, were given on a specified date and were based on market information and the need to remain competitive. Each job classification had a salary range based on the salaries of other medical facilities, cost of living index, complexity of the job, educational requirements and availability of qualified applicants. The salary range for each job classification was divided into 10 ''steps'' with 2-1/2-percent variation between each step, or a variation of 25 percent between ''step one'' and ''step 10.'' Every ''step'' in a job classification received the same percentage increase effective the pay period closest to the beginning of the fiscal year. Depending upon market conditions and vacancies, some classifications, such as registered nurses, could receive a a higher percentage increase than other occupations which were not experiencing a shortage of personnel. (2) *Merit increases* were given to employees not at the top of the salary range, based on performance quality and attendance, and took place on the employee's anniversary date, and varied from one to three ''steps'' up on the salary range, each step amounting to 2-1/2 percent. (3) *Outstanding performance awards* were given on their anniversary date to employees already at ''step'' 10 of the salary range upon written recommendation for continued outstanding performance and consisted of a lump sum payment equal to 5 percent of the employee's prior year's salary. These were suspended and the salary program underwent modification in 1987 when the hospital began to lose money.

Holt testified that in the fall of 1987, when the hospital began budgetary planning for fiscal year 1989, it was losing money at an alarming rate and consequently instituted cost-cutting changes in its compensation program. *General or across-the-board increases* were reduced, with the largest, 4 percent for nurses, 3 percent for pharmacists and other technologists, and 2-1/2 percent for LVNs and a few other classifications. *Merit increases* of 2-1/2 percent were available for those not at the top of the range on their normal review date. Employees at the top of the range in occupations which did not receive the across-the-board increase were to receive a *bonus* of 2-1/2 percent of their 1987 earnings, with payment to be made June 23, 1988.

Budget planning for fiscal year 1990 commenced the fall of 1988 and continued through the spring of 1989. Inasmuch as the hospital continued to lose money, according to Holt, it continued ''maintaining a very conservative posture'' which included further modification in the salary program. In order to ''more equitably reward all employees for performance, regardless of where they were in the salary range,'' the pay for performance system converted from a 10-step rate file with 2-1/2 percent per step, to a 26 step rate file with 1 percent per step, followed by range adjustments, thus giving the hospital more flexibility to reward performance with its limited funds, according to Holt. The change and adjustment was accomplished in the 6 weeks preceding the start of the fiscal year 1990 on July 1, 1989. As in prior years, different classifications of employees received different percent range adjustments depending on market conditions and the hospital's ability to pay. Thus, RNs received a 5-percent range adjustment while other classifications received smaller range adjustments. However, neither the step adjustment nor the range adjustment involved an actual pay increase for anyone. Instead, Respondent adopted a new performance appraisal concept whereby department heads were each allotted a specific amount of money which could be given out during the fiscal year as performance-based increases. The department head had discretion of granting anywhere from 1- to 5-percent increases to employees based on their performance so long as the budgeted amount was not exceeded. The increases were given as either ''merit increases,'' a movement upward a step on the salary range as long as it didn't take them above step 26, which was the top of the range, or as ''bonuses,'' a lump sum based on a percentage of the prior year's earnings for those at the top of the range. The merit increases were given on the employee's anniversary date, whereas ''bonuses'' could be given anytime during the fiscal year. An employee near the top of the step 26 range could receive a ''merit increase'' to step 26 and a ''bonus'' for any percentage beyond that so long as the amount did not exceed 5-percent total for both the merit increase and ''bonus.'' The record shows that RNs at the top of the range were eligible and received bonuses under the plan in fiscal year 1990.

Budget planning for fiscal year 1991 commenced in the fall of 1989 and continued through the spring of 1990, by which time, according to Holt, Respondent's cost containment and revenue enhancing programs had taken effect and as a consequence the hospital's financial condition had improved. It was decided at the fall 1989 administrative retreat that since there had not been a general wage increase the prior year and only limited increases before that, that the Respondent would have to do more about wages. There was discussion regarding a continuing shortage of all professionals, including pharmacists, the vision plan and the increase in health plan costs which had been absorbed by employees in recent years. Holt recommended RNs receive at least a 6-percent increase, add another step for tenure, no across-the-board increases and maintain the pay for performance and performance bonus payment system. The decisions as to how much of a pay rate increase was to be awarded each of the various classifications was made in late March 1990 after receipt of the HHRMAC survey results in early March. While most classifications received a 5-percent general wage increase, nurses, engineers, pharmacists, and phlebotomists received larger percentage increases. The system of awarding performance merit increases for employees not at the top of the pay range, and bonuses for those at the top of the range was also continued with a 5-percent maximum given by a department head as long as it did not exceed the departmental merit budget for fiscal year 1991. Final decisions with respect to the budget proposal were completed in late March or early April 1990, and the budget package was mailed to the budget committee on April 18. Following approval of the fiscal year 1991 budget by St. Joseph Health System, on May 17, Sister Ann issued a memorandum to employees, attached hereto as Appendix B, informing them of the wage increase effective July 1, 1990, vision care for dependents and assumption by the hospital of premium increases effective January 1, 1991. The letter goes on to explain ''that because of the petition filed with the NLRB by the nurses' union, CNA, we will not be able to put the July 1 wage increase into effect for any employees who may be covered by the petition.''[13] On May 22, 1990, CNA wrote Sister Ann that it agreed the hospital should grant an ''up to'' 5-percent increase and that it had no intention of filing an unfair labor charge if such an increase be granted. The letter is attached hereto as Appendix C. Respondent's legal counsel responded to CNA's letter on May 24, 1990, stating that the July 1 wage increases to nurses and other professionals would be granted if the Union informed the Board's Regional Office that it would waive the filing of any unfair labor practice charge and objection to an election in connection with the granting of such increase. The letter is attached hereto as Appendix D. By letter of June 4, 1990, CNA agreed to do so and on June 6, 1990, Sister Ann informed the RNs and other professionals that the increases would go into effect and be reflected in their July 5 paychecks.

3. Unfair labor practice allegations

Paragraph 7(a) alleges that on May 17, 1990, Sister Ann promised employees improvements in health care benefits by extending vision care coverage to dependents and by its absorption of any increase in employee medical insurance premiums in order to discourage CNA and/or Local 250 support. This allegation is grounded in Sister Ann's May 17, 1990 memorandum, attached hereto as Appendix B. The General Counsel argues that the announced improvements in health plan insurance benefits and absorption of premium increases, made shortly after the CNA election petition was filed and the hospital's knowledge of Local 250 organizing efforts, was calculated to undermine employee support for organizing and presumptively a violation of Section 8(a)(1) and constituted objectionable conduct; and that in the absence of Respondent's showing that the timing of the announcement was governed by factors other than the pendency of union activity, as here, such timing is calculated to influence employees in choosing a bargaining representative. The Respondent argues that the recommendations for the improvements were made at the November 1989 administrative council retreat, prior to knowledge of union activity, and were announced per custom in May 1990, after the budget for fiscal year 1991 had been approved by the St. Joseph Health System.

[13] The CNA's petition was filed April 5, 1990.

Prior to 1989, Respondent's health benefits program consisted of two plans, a self-insured indemnity plan administered by Pacific Coast Administrators (PCA plan A) and a health maintenance organization called Health Plan of America (HPA plan). The latter was added in 1987 as part of a cost containment measure when the hospital was losing money. Until this time, the hospital had absorbed all of the costs of the plans. One of the cost containment measures was to start charging employees, effective January 1, 1988, for a part of the cost of the health insurance plans. Open enrollment period when employees can either sign up for or change health plans is each November, and changes in the health care program are always effected on January 1 of the succeeding year. In January 1989 and January 1990, the Respondent passed the increase in the cost of the plans' premiums on to the employees. In early November 1989, during the open enrollment period, a number of employees complained about the high premiums and indicated they ''would prefer to do a little self-insurance themselves and have a higher deductible that would cause them to have to pay money if they use the insurance, but have a lower premium.'' As a consequence, a third plan, PCA plan B, was developed and offered employees effective January 1, 1990. As of that date, of approximately 800 employees covered by the plans, 90 percent were in the HPA plan, 7 percent in PCA Plan A and 3 percent in PCA Plan B. Also at the November 1989 fall retreat, Holt recommended that no additional pass through of premium increases be made for fiscal year 1991. He explained that the hospital was in better financial condition and that further passing through premium increases would make health insurance so expensive that employees could no longer afford it. His recommendation was accepted by the administrative counsel and the November 1989 retreat prior to knowledge of union organizing and implemented on January 1, 1991.

For an undisclosed number of years, Respondent's employees have had a self-insured vision plan for which the hospital paid the expenses, and which covered only the employee. It was administered through Pacific Coast Administrators. Holt testified that in the fall of 1987, when the HPA plan was first made available, and again in the fall of 1988 and early 1989 when the budget for fiscal year 1990 was being drafted, adding vision care for dependents was under consideration but was decided against because of the financial condition of the hospital. At the fall retreat in November 1989, prior to knowledge of any union activity, Holt again recommended that dependent vision be added ''for sure in Calendar 91,'' which was adopted by the administrative council and went into effect January 1, 1991.

''Although granting employee benefits during the period immediately preceding an election is not per se ground for setting aside an election, in the absence of a showing that the timing of the announcement was governed by factors other than the pendency of the election, the Board will regard such timing as calculated to influence the employees in their choice of a bargaining representative. The burden of showing other factors is on the employer. . . . As a general rule, an employer, in deciding whether to grant benefits while a representation petition is pending, should decide that question as it would if a union were not in the picture.'' *Essex International, Inc*., 216 NLRB 575, 576 (1975). In my view, the Respondent has met that burden. It was shown that passing through to employees the increased health insurance premiums was instituted and maintained through the 2 years the hospital found itself financially strapped, and that vision care for dependents had been considered and rejected in those years for the same reason. Prior to knowledge of union organizing activities, and in accordance with prior custom, the plans for improvement in each benefit were developed and approved by the administrative counsel during the budget retreat in November 1989, after it was clear that the hospital's financial condition had improved. The hospital had a legal obligation when it became known that the Unions were organizing, to proceed as though no union were in the picture. The May 17, 1990 announcement by Sister Ann that vision care for dependents and assumption of health premium increases would be paid for by Respondent, follows a sequential step in a budget calendar chronology that had been followed for years, i.e., the budget retreat in November, submission of budget packages to department heads in January, the submission of the budget to the St. Joseph Health System in late April or early May, and finally the announcement to employees outlining in general what effect the budget for the following fiscal year will have on them. I conclude and find that the announcement of the benefits in May conforms to a past practice and that the benefit improvements had been planned and determined prior to knowledge of union activity. This leads me to find that the allegations in paragraph 7(a) have not been proved and recommend its dismissal. *Greenbrier Valley Hospital*, 265 NLRB 1056 (1982); *Coronet Instructional Media*, 250 NLRB 940 (1980).

Paragraphs 19(a) and (b) allege that on various occasions on or about November 9, 1990, Holt informed employees that the benefits discussed above regarding vision care coverage and absorption of the increase in health care premiums would be effected and that health care costs for employees using Respondent's self-insured plans—PCA plans A and B—would decrease. Having found that it was not unlawful on May 17, 1990, to announce the extension of vision care to dependents and absorption of any increase in health care premiums in the HPA plan, it follows that it was not unlawful to reiterate those changes at a later date, nor could it have had any effect on the CNA election, which had been held in October.

Regarding the reduction in the premium of the PCA plans, the record shows that the premiums for both the PCA plan A and PCA plan B self-insured indemnity plans are determined by actuarial consultants who look at the prior year's claims experience to establish rates under the Comprehensive Omnibus Reconciliation Act (COBRA). The actuarial analysis is done in October of each year and the Respondent receives the information in early November. The analysis for calendar 1991 was received by Respondent on November 7, 1990, and disclosed that the premium rates for 1991 would be lower than in the previous year because of better experience under the plan. Holt testified that the hospital felt it would be ''a breach of faith with our employees if we had a reduction and didn't pass it on.'' He testified the hospital had no information indicating the premium rates were going to be reduced prior to November 7, 1990. Thus, premium rates were reduced to the extent they were reduced by the actuaries. The reduction was in the amount paid by the employee, while the hospital's contribution remained the same and had no impact on the budget. I note again that the an-

nouncement regarding the reduction in the premium rates in November could not have impacted on the CNA election already past. Nor, in my view, could it have had any effect on the Local 250 representation election which was blocked by a charge and not held until June 26, 1991. Further, no objections were filed with respect to that election. More importantly, the General Counsel has failed to establish an unlawful motivation. Accordingly, I recommend paragraph 19 be dismissed. It follows that the granting of those benefits on January 1, 1991, was not unlawful. Accordingly, I recommend paragraph 20(b) of the complaint be dismissed.

Paragraph 20(c) alleges that on or about July 1, 1990, Respondent granted bonuses to RNs at the top of the wage scale in order to discourage them from engaging in activities supporting CNA. The General Counsel argues that on July 1, 1990, Respondent implemented a wage increase program for the first time that resulted in a bonus payment for nurses who were at the top of the hospital's wage scale, and that in the face of a pending organizing campaign, such conduct was presumptively unlawful. As shown in section 2 above, salary administration policy for fiscal year 1989, employees at the top of the range in occupations which did not receive an across-the-board increase were eligible to receive a bonus of 2-1/2 percent of their 1987 earnings, with payments to be made June 23, 1988. In fiscal year 1990, with the institution of the new 26 step rate file and adoption of the new performance appraisal concept, employees could receive a 5-percent increase, as either a ''merit increase,'' a movement upward on the salary range so long as it did not take them above step 26 which was the top of the range, or as ''bonuses,'' a lump sum based on a percentage of the prior year's earnings for those at the top of the range. An employee near the top of the step 26 range could receive a ''merit increase'' to step 26 and a ''bonus'' for any percentage beyond that so long as the amount did not exceed 5-percent total for both the merit increase and ''bonus.'' As shown, RNs at the top of the range in fiscal 1990 were eligible and received such bonuses. Thus, the record establishes that in fiscal year 1990, the RNs participated in the hospital's performance-based increase program, including the receipt of ''bonuses.'' The General Counsel having failed to establish by a preponderance of the evidence that in fiscal year 1991 RNs at the top of the scale were treated any differently in connection with the granting of performance-based increases or bonuses than in prior years, I recommend dismissal of paragraph 20(c).

Paragraph 20(a) alleges that on or about July 1, 1990, Respondent granted a wage increase to engineers and pharmacists in order to discourage activity on behalf of CNA or Local 250. The General Counsel claims the raises to these two classifications in amounts exceeding 5 percent was to reward them for their opposition to union representation. The Respondent argues that it has been the historic and normal practice to implement different percentage increases for different job classifications depending on the market rate and how difficult it is to recruit and retain qualified candidates. Respondent also argues that there are only about 12 pharmacists in the CNA unit of 340 employees, and only 8 to 10 engineers in the Local 250 unit of 600 employees, so it is foolhardy for the General Counsel to argue the hospital was trying to ''bribe'' employees in order to influence the elections. It also points out that the General Counsel gave no explanation why the larger than 5-percent raise of the nurses and phlebotomists was supposedly not unlawful.

It is undisputed that four classifications of employees received raises in excess of 5 percent. Thus, the RNs received a 6-percent increase, and phlebotomists along with engineers and pharmacists received 8-percent increases. While the complaint initially alleged unlawful wage increases to engineers and phlebotomists, it was amended at the hearing by substituting pharmacists in the place of phlebotomists, so that the only unlawful wage increases alleged and litigated were those given engineers and pharmacists.

At the outset it is noted that Respondent's salary administration policy (R. Exh. 9), effective since February 1977 and revised June 9, 1985, contains the following pertinent provisions:

> *GENERAL POLICY*:
>
> 1. Hospital grade scales and salary ranges have been established, based on salaries paid by other medical facilities located within a reasonable commuting distance from Napa, the cost of living index, salaries paid by non-medical facilities, complexity of the job, educational requirements, and availability of qualified applicants.
>
> . . . .
>
> 7. The hospital reviews all job salary ranges annually and makes necessary adjustments in the ranges to keep the salaries at a competitive level.

Holt testified that the raises to the four classifications in excess of 5 percent were given because of market conditions and the difficulty in filling the positions. On January 8, 1990, Holt had written Matt Larson regarding the need for a 6-percent increase in salary in addition to other benefits for the RNs based on wages and benefits paid by other hospitals. Regarding engineers, he compared the Respondent's average maximum pay for maintenance engineers in January 1990, which was $15.82 per hour with the HHRMAC survey which was received in March 1990 showing the average maximum pay for maintenance engineers was $17.51 per hour, showing Respondent was paying them approximately 10 percent below the market rates, and recommended an 8-percent increase in order to remain what he felt to be competitive with other hospitals. With respect to pharmacists, the record establishes that they have been in short supply and that Respondent had open positions for one or two pharmacists for quite some time and in one instance was required to pay moving expenses for a pharmacist coming from Florida. Because of the shortage, it is necessary to start them at the top of the pay range. Therefore, the decision to provide them with an 8-percent increase for fiscal year 1991 was made.

There is no doubt that the Respondent was aware of the two Union's organizing activities at the time the raises were announced. Thus, the General Counsel argues, citing *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), that the most logical explanation for the higher increase for engineers and pharmacists was to reward them for their opposition to the union, and, therefore, violated Section 8(a)(1). It was not shown, however, that at the time the decision to grant the increases was made that the Respondent had any knowledge of their union or nonunion preferences. Further, the Respondent's salary administration policy, introduced in evidence,

makes it clear that it is the Respondent's policy to review all job salary ranges annually and to make adjustments in the ranges to keep them at a competitive level, and that this is done by conducting its own inquiries and by participating in the annual HHRMAC survey conducted among competitors. Thus, it is clear that the improvement made in the wages of the engineers and pharmacists flowed from those surveys and from Respondent's own experience regarding the difficulty in finding and keeping qualified employees to fill those positions. In sum, it appears that Respondent's actions here were in basic conformity with its established and published policy. Finding a failure to show antiunion motivation, I recommend the dismissal of paragraph 20(a) of the complaint. *Gould, Inc*., 221 NLRB 899 (1975); *Essex International, Inc*., 216 NLRB 575 (1975).

D. *Withholding Professional Employee Wage Increases*

As outlined heretofore, on May 17, 1990, Sister Ann issued a letter (App. B attached) informing employees of the acceptance of the 1991 fiscal year budget with ''a wage increase effective with the pay period beginning July 1, 1990,'' and further informing them of the benefit changes, discussed infra. It goes on to state:

> We have been advised that because of the petition filed with the NLRB by the nurses' union, CNA, we will not be able to put the July 1 wage increase into effect for any employees who may be covered by the petition. CNA has amended its petition once already and sent out at least two flyers last week announcing its apparent amendment of the petition again to seek to represent all RN's *and all health professionals*.
>
> Under our new budget, all employees except those who may be included in the CNA petition will be eligible to receive up to a 5% increase effective July 1, 1990, if recommended by their supervisor for the increase is based on the employee's performance.

On May 22, CNA wrote Sister Ann that it agreed to an increase ''up to'' 5 percent and had no intention of filing an unfair labor charge if it was granted. (App. C attached.) This was followed by Respondent's legal counsel's May 24 letter in response to CNA that the wage increases to nurses and other professionals would be granted if CNA informed the Board's Regional Office that it would waive the filing of a charge or objections to an election in connection with the increase. (App. D attached.) Upon CNA's agreement to do so, on June 6, Sister Ann informed the RNs and other professionals in writing as follows:

> As you know, it is our normal practice following our annual budget review and approval process to announce to our staff the specifics of the new information regarding wage increases and/or adjustments.
>
> Today, we received guidance from our legal counsel that we can proceed with our normal practice. Therefore, you will be informed by your supervisor or department head about the amount of increase you will receive. This increase will be on the paycheck you receive on the July 5th payday.

Paragraph 7(b) of the complaint alleges that Sister Ann's May 17 letter threatened employees that pay increases were being withheld from certain employees because of their support for and activities on behalf of CNA. Paragraph 24 alleges Respondent's counsel's letter violated Section 8(a)(1) in that it demanded that CNA waive its statutory right to file an unfair labor practice charge if it wanted Respondent to grant employees being organized by CNA a wage increase.

The General Counsel argues that an employer is required to proceed in those circumstances as if the Union were not on the scene and that instead of assuring nurses and health professionals that this was only a postponement of an increase and it would continue to follow its past wage policies with or without a union, Sister Ann's letter placed the full onus for the absolute denial of the wage increase on the CNA. It is argued that the intent of placing the onus on the Union is reinforced by Respondent's counsel's letter to CNA which describes the Union as ''an obstacle to the granting of the wage increase.''

The Respondent argues that it was faced with a situation where it had already determined to grant a general wage increase which had not been granted the prior year due to its poor financial condition, and faced with the CNA representation petition, it was advised by its legal counsel that it couldn't institute the general increase without the risk that it might be considered an unfair labor practice. Therefore, Sister Ann issued the notice of May 17 to the effect that the hospital had been advised that because of the CNA petition, the July 1 wage increase would not be put into effect for employees covered by the CNA petition. This was followed by her June 8 memorandum advising all professional employees that they also *would* be receiving the general wage increase which went into effect on July 1, without any delay. Respondent claims any possible misunderstanding by employees as to the meaning of the May 17 letter, would have been corrected by June 8, more than 4 months before the October 18 election and could, therefore, have had no impact on the election. It is further claimed that there is no case law making it unlawful for an employer to request that a union waive the filing of charges or objections before an employer institutes a pay increase which the union could claim was itself improper, as was done in this case.

With the exclusion of the two unfair labor practice allegations now under consideration, the consolidated complaint contains 29 allegations of other 8(a)(1) conduct, none of which has been proven by a preponderance of the evidence. Thus, to this point the record is void of any showing of antiunion animus on the part of Respondent. It is in this context that I view the May 17 letter by Sister Ann and Respondent's counsel's letter to CNA of May 24, the subjects of complaint paragraphs 7(b) and 24, respectively.

At the time Sister Ann wrote the May 17 letter, CNA's petition was pending and Respondent had been informed of Local 250's organizing efforts. Nothing could be clearer than that the May 17 letter, whether or not Sister Ann had announced the withholding of the wage increase from RNs and health professionals, would provoke a complaint allegation of unlawful conduct with respect to the granting of wage increases. In this regard, see complaint paragraph 7(a) alleging the May 17 letter's unlawful promise of improvements in health care benefits concerning vision care coverage for dependents and absorption of any increase in employee medical benefits insurance premiums. It would of course have been unlawful for the Respondent to have withheld all of the ben-

efits which it had already planned since case law holds that it must proceed in the face of a union petition for election as though no union is on the scene. Thus, Respondent was caught between a rock and a hard place to the obvious advantage of the Unions. Whatever it did, it could be accused of violating the Act. Having found itself in this position, it is not surprising that Respondent sought advice of legal counsel who took steps to extricate it from that unenviable position. The natural and prudent thing to do, as was done here, was to seek the assurance from CNA, who at that point had objected to the withholding of the wage increase, that it would not file a charge or objection to election if the wage increase for RNs and professionals was reinstated. Upon that assurance, the personnel involved were informed on June 6 that they also would receive the wage increases on July 1 as previously announced.

I have not been cited, nor have I found, any case law that makes it unlawful for a Respondent's legal counsel to request that a union waive the filing of an unfair labor practice charge or objections to an election in circumstances similar to those presented here. In my view, Respondent's counsel's attempt to avoid an unfair labor practice charge and the filing of objections was perfectly proper, and it would have been remiss in not taking the action it did.

Consideration of the above facts causes me to conclude that the evidence does not preponderate in favor of a finding of a violation with respect to either paragraph 7(b) or 24. There has been a total lack of credible evidence that the Respondent disparaged or undermined either union or that it sought to reward or punish employees for either engaging in or not engaging in union activities or the pursuit of Section 7 rights. Accordingly, I recommend dismissal of paragraphs 7(b) and 24 of the complaint.

To recap, I recommend the consolidated complaint be dismissed in its entirety.

E. *The Objections*

At the conclusion of the General Counsel's case-in-chief, the representative for CNA stated it would not pursue any election objections filed in the case that did not parallel the unfair labor practice allegations contained in the complaint and further withdrew Objections 3, 7, and 8. The remaining objections state:

> 1. During the critical pre-election period, the Employer discriminatorily promised and/or granted lump-sum bonuses to certain of its employees to vote against the Petitioner in the pending election; the Employer simultaneously withheld said bonuses from certain other employes in order to retaliate against them for their support of and activities on behalf of the Petitioner.
>
> 2. During the critical pre-election period, on or about July 1, 1990, the Employer implemented wage increases in amounts larger than previously announced for certain employees in order to encourage those employees to vote against the Petitioner in the pending election;
>
> 4. During the critical pre-election period, the Employer, by its supervisors and agents, threatened employees with the loss of certain benefits, and the closing of the Employer's hospital, if the Petitioner won the pending election.
>
> 5. During the critical pre-election period, the Employer, by its supervisors and agents, promised employees benefits and improved working conditions if the employees rejected the Petitioner in the pending NLRB election.
>
> 6. During the critical pre-election period, the Employer, by its supervisors and agents solicited employee grievances and made implied promises of benefits to the employees if the employees rejected the Petitioner in the pending NLRB election.

The General Counsel having failed to establish evidence to prove by a preponderance of the evidence the complaint allegations which would support the objections, and the CNA having failed to adduce any further evidence, it is recommended that Objections 1, 3, 4, 5, and 6 be overruled and that an appropriate certification be issued.[14]

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

APPENDIX A

Sister Ann

- As you know, we just completed one election.
- A *majority* of those who voted in the CNA election *chose to reject CNA.*

> - This *outcome* presents us with a *clear message*—and a clear challenge;
>
> 1 - We *have to* do a better job of *listening*!
>
> 2 - We *have to* find more effective ways of *communicating*!
>
> 3 - We *have to* find better ways of *involving the staff*!

- These 2 Unions (CNA & 250) have spent the last few weeks heaping insult after insult at the queen—they've used the newspapers and radio.

> - CNA may even continue this approach because they don't have to accept *the voice* of the majority.
>
> - 250 clearly is continuing this behavior!

- I view these ''attacks'' on the queen as *''attacks'' on our integrity*—The Hospital's, my own, our management and on you, the staff.
- It makes me angry and I don't mind making this very clear—I'm angry at Local 250 and those who have advised them to take this approach of ridicule and insult.
- *They attack the consultant*—

> When they do, they attack me!
>
> - When they say our adviser is telling us to violate the law, manipulate and lie to the staff—they are saying that *the Sisters of St. Joseph of Orange and, I personally, would encourage, support or condone this unethical behavior*. When they attack the consultant—they attack us and me.

- The information we have given out has been factual and accurate, and Local 250 calling it ''lies'' doesn't change the truth.

- This whole approach of theirs is clearly intended to distract people's attention from the real issues—this election isn't about consultants.

- 250 has been trying to put QVH of the defensive—they want us to be embarrassed for hiring a knowledgeable expert to help us.

- Not only will we *not* apologize or feel badly—I want you to know that we are very glad we made the decision to seek expert advice.

- We have an *obligation to all of the employees at QVH*—to those who *do not* want this Union as well as to those who do. The Federal Labor Laws protect *both* rights equally—the right to organize and the right *not* to organize.

— PAUSE —

We have an obligation to the common good

— To our employees!
— To our community!
— To the viability of our Hospital!

PAUSE—

The choices we faced in April of this year were:

1. Do nothing in response to the Union's petition and 250's organizing efforts, or

2. Chose to act—to compile the facts and reveal the truths about these unions, to inform and educate *our management* and ensure compliance with the law, and to educate our staff on subjects which were unfamiliar to most of us.

We chose to act!

APPENDIX B

May 17, 1990

TO: ALL EMPLOYEES
FROM: Sister Ann
SUBJECT: July 1, 1990 Wage Increase

Our annual budget for FY 90–91 has been accepted by officials at the St. Joseph Health System. That information allows us to move ahead with our rate file adjustments and to have a wage increase effective with the pay period beginning July 1, 1990. Other items included in our budget for next year include vision care for dependents effective January 1, 1991, and the assumption by the hospital of all of the premium increases that may become effective January 1, 1991 for any medical, dental or vision plan we offer to employees.

We have been advised that because of the petition filed with the NLRB by the nurses' union, CNA, we will not be able to put the July 1 wage increase into effect for any employees who may be covered by the petition. CNA has amended its petition once already and sent out at least two flyers last week announcing its apparent amendment of the petition again to seek to represent all RN's *and all health professionals*.

Under our new budget, all employees except those who may be included in the CNA petition will be eligible to receive up to a 5% increase effective July 1, 1990, if recommended by their supervisor for the increase is based on the *employee's performance*.

These employees will also be eligible for up to a 5% additional increase if they are not at the top of their range and if recommended for the increase by their supervisor based on the employee's performance. This additional increase would be effective on the employee's anniversary date. In no event would an employee be paid more than the top of the salary range.

In my announcement of wage adjustments last year, I said: ''. . . I think it is more appropriate that we pause and reflect on the things we have done together during the last 12 to 15 months. We have squarely faced our challenges and we have taken the appropriate actions to protect our hospital's future—which means we are protecting each other's future.''

I can think of nothing that can or should be added to what I said last year. We should not forget what we have been through together.

God bless.

SA:dp

APPENDIX C

May 22, 1990

Sister Ann McGuinn, CSJ, President
Queen of the Valley Hospital
1000 Trancas Street
P.O. Box 2340
Napa, CA 94558

Subject: CNA agrees to 5% wage increase 7/1/90

Dear Sister Ann:

This is in response to your recent memo announcing a wage increase ''up to'' 5%, effective July 1, 1990 for all hospital employees except Registered Nurses and Health Professionals.

Because of the urgent need to improve recruiting immediately, CNA agrees to an ''up to'' 5% increase as an interim measure until negotiations can begin. We have no intention, if this is your concern, of filing an Unfair Labor Practice Charge with the National Labor Relations Board should an ''up to'' 5% increase be implemented. In fact, our intent is to file a complaint if regular annual wage increases are not implemented; if regular tenure step raises are denied or if negative changes in benefits occur.

As you are aware, Section 8(a)(1) of the National Labor Relations Act is designed to prevent intimidation or ''bribes'' in the form of changes in wages and working conditions while an organizing campaign is underway. It was never meant to prevent employers from implementing regular annual wage increases, scheduled step increases or maintaining benefits. Indeed, if an employer fails to implement regular or scheduled increases, simply because an election petition has been filed, that action would be considered a violation of the law.

It is the goal of the employees at QVH who initiated the election petition to solve problems at QVH and to help the hospital provide the best possible patient care and the best possible working conditions., One of the greatest problems

facing the health care industry is the growing shortage of Registered Nurses and Health Professionals. Recruitment and retention is a key concern of all of us; and compensation is directly tied to the hospital's ability to recruit and retain sufficient numbers of professionals to give safe patient care.

Patient care suffers during staff shortages and patient care is too important to be the victim of an anti-union campaign. Although a 5% wage increase is hardly sufficient to solve recruitment and retention problems, and just covers this year's rise in the cost of living, it would be detrimental to postpone the increase.

Furthermore, the Association strongly urges the hospital to immediately address other serious staffing issues, such as maintaining adequate coverage for PM, night and weekend call-back assignments in the Home Care Department. If the solutions reached to these staffing issues are agreeable to the employees involved, and with notice to CNA, the Association will waive its legal rights to file unfair labor practice charges against the hospital.

Sincerely,

/s/ Janet Sass McDermott
C.N.A. Labor Representative

cc: Kay Hendren, National Labor Relations Board

APPENDIX D

May 24, 1990

Ms. Janet Sass McDermott
CNA Labor Representative
1100 Eleventh Street, Suite 200
Sacramento, CA 95814

Re: *Queen of the Valley Hospital*

Dear Ms. McDermott:

This office represents Queen of the Valley Hospital. Queen of the Valley has received your May 22, 1990 letter regarding the Hospital's wage structure for its next fiscal year.

As you know, certain legal restrictions are placed on an employer once a union organizing petition has been filed with the NLRB. Queen of the Valley would have granted a July 1, 1990 increase to its nurses and other professionals, along with its other employees, except for the legal restrictions placed on the Hospital by the filing of your petition. If your organization is truly willing to remove itself as an obstacle to the granting of that increase, you will need to provide the National Labor Relations Board with a written statement that your organization will not file and is expressly waiving any future right to file with the NLRB (1) any unfair labor practice charge *and* (2) any objection to the results of any future election in connection with the granting of this wage increase.

Once this office has received a copy of your letter to the NLRB as outlined above, the Hospital will be happy to also implement a July 1 wage increase for nurses and other professionals, as it would have given them that increase originally except for the legal restrictions placed on it by the filing of your petition.

Very truly yours,

/s/ Philip L. Ross

PLR/jf